Clean Water Act — "Waters of the United States" — Sackett v. EPA

The Clean Water Act[1] is the principal federal water pollution statute. It prohibits unpermitted discharges of pollution into "navigable waters,"[2] which the statute defines to mean "the waters of the United States."[3] The meaning of that definition has long been the subject of controversy.[4] But last Term, in *Sackett v. EPA*,[5] the Court finally clarified the jurisdictional scope of the Clean Water Act. Siding with Justice Scalia's plurality opinion in *Rapanos v. United States*,[6] the Court first held that the term "waters of the United States" encompasses only those water features that are described in ordinary parlance as "streams, oceans, rivers, and lakes."[7] The Court then held that "waters of the United States" does include some wetlands, but only those wetlands with a "continuous surface connection" to otherwise covered waters.[8]

In *Sackett*, two concurrences criticized the perceived environmental consequences of the majority opinion,[9] and one denounced the Court's alleged desire to reduce the regulation of wetlands.[10] However, those criticisms are overstated.[11] The disagreement at the Court was a narrow one, with all nine Justices agreeing that many wetlands, including the Sacketts' wetlands, do not qualify as "waters of the United States."[12] And even the limited category of wetlands that formed the basis of the Court's dispute will not necessarily lose protection. The opinion leaves open both doctrinal and practical avenues for wetlands regulation, including the Court's recent decision in *County of Maui v. Hawaii Wildlife Fund*[13] and the potential for continued state regulation.

In 2004, Michael and Chantell Sackett purchased land in Bonner County, Idaho, near Priest Lake, and soon began filling the wetlands on

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[1] 33 U.S.C. §§ 1251–1389.

[2] *Id.* §§ 1311(a), 1362(12).

[3] *Id.* § 1362(7).

[4] *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 718 (2006) (syllabus) (fracturing 4–1–4 on the term's meaning).

[5] 143 S. Ct. 1322 (2023).

[6] 547 U.S. 715.

[7] *Sackett*, 143 S. Ct. at 1336 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion)).

[8] *Id.* at 1341.

[9] *See id.* at 1359 (Kagan, J., concurring in the judgment); *id.* at 1362 (Kavanaugh, J., concurring in the judgment).

[10] *See id.* at 1360 (Kagan, J., concurring in the judgment).

[11] To be sure, the case's environmental implications are, or should be, irrelevant to the legal question of which wetlands the Clean Water Act covers. *See id.* at 1343 (majority opinion). Nevertheless, this comment seeks to make a useful contribution to the post-*Sackett* commentary by responding to concerns that were endorsed by four Justices and that featured prominently in two concurring opinions. *See id.* at 1360–61 (Kagan, J., concurring in the judgment); *id.* at 1368 (Kavanaugh, J., concurring in the judgment).

[12] *See id.* at 1341 (majority opinion); *id.* at 1362 (Kavanaugh, J., concurring in the judgment).

[13] 140 S. Ct. 1462 (2020).

their property.[14] A few months later, the Environmental Protection Agency informed the Sacketts that their filling activity violated the Clean Water Act.[15] The Clean Water Act makes it unlawful to put "any pollutant,"[16] including dredged or fill material,[17] into "navigable waters," defined as "the waters of the United States."[18] It was the term "waters of the United States" — and the extent to which that term encompasses wetlands — that the *Sackett* Court interpreted.[19]

The EPA's theory of why the Sacketts' land counted as part of the "waters of the United States" relied on the "significant nexus" test from Justice Kennedy's concurrence in *Rapanos*.[20] The EPA claimed that (1) the wetlands on the Sacketts' property were "adjacent to" (that is, "neighboring") an "unnamed tributary"[21] — separated from their property by a thirty-foot road — that fed into a non-navigable creek, which in turn fed into Priest Lake, a traditionally navigable water; and (2) the Sacketts' wetlands, together with a nearby wetland complex, "significantly affect[ed]" the water quality of Priest Lake, such that there was a "significant nexus" between the wetlands and Priest Lake.[22] The Sacketts challenged the EPA's compliance letter, arguing that the EPA lacked jurisdiction over their wetlands.[23] After multiple rounds of litigation over the status of the compliance letter,[24] the district court eventually granted summary judgment for the EPA.[25]

The Ninth Circuit affirmed in an opinion by Judge Friedland.[26] Applying Justice Kennedy's "significant nexus" test,[27] the Ninth Circuit held that the Sacketts' wetlands qualified as "the waters of the United States" because the wetlands were "adjacent to a jurisdictional tributary and . . . together with the similarly situated [nearby wetland complex], they have a significant nexus to Priest Lake."[28]

The Supreme Court reversed. Writing for the Court, Justice Alito[29] clarified the jurisdictional scope of the Clean Water Act in two key

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[14] *Sackett*, 143 S. Ct. at 1331.

[15] *Id.*

[16] 33 U.S.C. § 1311(a).

[17] *Id.* § 1362(6).

[18] *Id.* § 1362(7); *see also id.* § 1362(12). The statutory definition of "pollutant" is broad, covering "rock, sand, [and] cellar dirt" in addition to a variety of other substances. *See id.* § 1362(6).

[19] *Sackett*, 143 S. Ct. at 1332.

[20] *See* Rapanos v. United States, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring in the judgment).

[21] *Sackett*, 143 S. Ct. at 1331.

[22] *Id.* at 1332.

[23] *Id.*

[24] *See* Sackett v. EPA, 566 U.S. 120, 131 (2012) (holding that the compliance order was a final agency action that could be challenged pursuant to § 704 of the Administrative Procedure Act).

[25] Sackett v. EPA, No. 08-cv-00185, 2019 WL 13026870, at *13 (D. Idaho Mar. 31, 2019).

[26] Sackett v. EPA, 8 F.4th 1075, 1079 (9th Cir. 2021).

[27] *Id.* at 1088–89.

[28] *Id.* at 1092.

[29] Justice Alito was joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett.

respects. First, the term "waters of the United States" encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[30] Second, "some wetlands qualify as 'waters of the United States'"[31] — but only those wetlands that have a "continuous surface connection"[32] with one of the relatively permanent bodies of water just mentioned, such that the wetland is "indistinguishably part of a body of water that itself constitutes 'waters' under the [Clean Water Act]."[33]

The Court first held that the Clean Water Act's use of "waters" refers to geographical features described in ordinary language as "streams, oceans, rivers, and lakes."[34] This formulation came from the *Rapanos* plurality opinion, which used dictionaries to discern the ordinary meaning of "waters."[35] *Sackett* harmonized *Rapanos*'s definition of "waters" with the Clean Water Act's use of the term "navigable."[36] The latter term indicates that "waters" refers to bodies of navigable water, such as rivers, lakes, and oceans — and not puddles or backyard swimming pools.[37] The Court also observed that other provisions of the Clean Water Act use the term "waters" in contexts that "confirm [that] the term refers to bodies of open water."[38]

The Court's second holding related to wetlands. A different provision of the Clean Water Act, § 1344(g)(1), "authorizes [s]tates to apply to the EPA for permission . . . to issue permits for the discharge of dredged or fill material into [certain] bodies of water."[39] States may apply to regulate discharges into "waters of the United States" — except they may not apply to regulate traditional navigable waters, "including wetlands adjacent thereto."[40] The Court acknowledged that § 1344(g)(1) means that "some wetlands must qualify as 'waters of the United States.'"[41] But which wetlands? The Court held that because § 1344(g)(1) states that wetlands are "includ[ed]" within "the waters of the United States," covered wetlands "must qualify as 'waters of the United States' in their own right."[42] The only wetlands that can boast that distinction

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30 *Sackett*, 143 S. Ct. at 1336 (alteration in original) (quoting Rapanos v. United States, 547 U.S. 715, 739 (2006) (plurality opinion)).

31 *Id.* at 1338–39.

32 *Id.* at 1341.

33 *Id.* at 1339.

34 *Id.* at 1336.

35 *Rapanos*, 547 U.S. at 739 (plurality opinion) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

36 *Sackett*, 143 S. Ct. at 1337.

37 *Id.*; *see also id.* at 1339.

38 *Id.* at 1337.

39 *Id.* at 1339 (citing 33 U.S.C. § 1344(g)(1)).

40 *Id.* (quoting 33 U.S.C. § 1344(g)(1)).

41 *Id.*

42 *Id.* (alteration in original) (quoting 33 U.S.C. § 1362(7)).

are those with a continuous surface connection to covered waters, such that they are "indistinguishably part of a body of water that itself constitutes 'waters' under the [Clean Water Act]."[43]

Section 1344(g)(1)'s use of the term "adjacent" did not demand broader coverage for wetlands, for four reasons. First, although the term "adjacent" can mean either "contiguous" or "near"[44] as a matter of "definitional possibilities," only the former meaning — "contiguous" — produces an outcome consistent with the rest of the statute, since wetlands are "include[d]" within "the waters of the United States."[45] Second, § 1344(g) is an ancillary provision of the Clean Water Act. Since Congress typically does not "hide elephants in mouseholes," it was implausible that Congress tucked an important expansion of the Clean Water Act's scope into a "relatively obscure provision" about state permitting programs.[46] Third, any implied amendment to the definition of the term "navigable waters" to mean "waters of the United States *and adjacent wetlands*" would require "clear and manifest" evidence of congressional intent, which the Court found lacking.[47] Fourth, the Court's precedents emphasized the need for a continuous surface connection.[48]

In reaching these holdings, Justice Alito declined to defer to an EPA regulation defining "waters of the United States" with reference to the "significant nexus" test.[49] For one, as discussed above, the EPA's interpretation was textually unsupportable.[50] Additionally, the EPA rule clashed with "background principles of construction," also called "presumptions" of statutory interpretation.[51] One such presumption is that Congress must use "exceedingly clear language" to alter the balance of federal versus state authority over private property.[52] Additionally, because criminal penalties attach to Clean Water Act violations, this case triggered the presumption that where a criminal statute is vague enough to raise constitutional concerns, a court will enforce it only to the extent of what "Congress certainly intended the statute to cover."[53]

The Court then rejected the EPA's two final arguments. First, the fact that Congress amended § 1344(g)(1) in 1977 to include "adjacent" wetlands did not mean that Congress had "implicitly ratified" the Army Corps of Engineers's pre-1977 wetlands regulation, which defined

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[43] *Id.*

[44] *Id.*

[45] *Id.* at 1340.

[46] *Id.* (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

[47] *Id.* (quoting Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 662–64, 664 n.8 (2007)).

[48] *Id.*

[49] *Id.* at 1341.

[50] *Id.*

[51] *Id.* (quoting Bond v. United States, 572 U.S. 844, 857 (2014)).

[52] *Id.* (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020)).

[53] *Id.* at 1342 (quoting Skilling v. United States, 561 U.S. 358, 404 (2010)).

"adjacent" wetlands to mean those that were "bordering, contiguous, or neighboring" to covered waters.[54] That was because (1) the text of the relevant provisions foreclosed that interpretation, as discussed above; (2) prior cases had already rejected similar arguments regarding other terms in § 1344(g)(1); and (3) the EPA could not provide the "overwhelming evidence of acquiescence" necessary to establish congressional ratification.[55] Second, the EPA's policy arguments about the environmental impact of an adverse ruling were irrelevant to the legal analysis.[56]

Justice Thomas concurred.[57] He joined the majority opinion in full, but wrote separately to "pick up where the Court [left] off."[58] He would have enforced the Clean Water Act only to the extent that it is consistent with Congress's legislative authority under the original meaning of the Commerce Clause.[59] First, he would have required the EPA to prove that Priest Lake was a navigable water under an expanded version of the Supreme Court's test from *The Daniel Ball*,[60] which would ask whether the Lake's waters "are, have been, or can be reasonably made navigable in fact."[61] Additionally, Justice Thomas would have required the EPA to show that an alleged violator's actions "would obstruct or otherwise impede navigable capacity or the suitability of the water for interstate commerce."[62]

Justice Kavanaugh concurred in the judgment only.[63] Like the majority, he agreed that the Sacketts' wetlands were not covered by the Clean Water Act.[64] He also agreed with the majority's rejection of the "significant nexus" test from Justice Kennedy's *Rapanos* concurrence.[65] His disagreement was over a particular category of wetlands that he thought were covered: those wetlands "separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like."[66] Justice Kavanaugh believed that the word "adjacent" in § 1344(g)(1) meant something broader than "adjoining."[67] He cited dictionaries for that conclusion, as well as other provisions of the Clean Water Act that use the term "adjoining" instead of "adjacent."[68] Justice Kavanaugh further argued that Congress's 1977 amendment of

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[54] *Id.* at 1343. The EPA and the Army Corps jointly enforce the Clean Water Act. *Id.* at 1330.
[55] *Id.* at 1343.
[56] *Id.* at 1343–44.
[57] *Id.* at 1344 (Thomas, J., concurring). Justice Thomas was joined by Justice Gorsuch.
[58] *Id.*
[59] *Id.* at 1345.
[60] 77 U.S. (10 Wall.) 557 (1870).
[61] *Sackett*, 143 S. Ct. at 1354 (Thomas, J., concurring).
[62] *Id.* at 1357.
[63] *Id.* at 1362 (Kavanaugh, J., concurring in the judgment). Justice Kavanaugh was joined by Justices Sotomayor, Kagan, and Jackson.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 1364.

§ 1344(g)(1) ratified the Army Corps's prior interpretation of "adjacent."[69] His opinion emphasized that over the span of forty-five years and eight consecutive presidential administrations, the Corps has included in its definition of "adjacent wetlands" those wetlands separated from covered waters by a barrier.[70] He also expressed concern about what he viewed as the majority opinion's "significant repercussions for water quality and flood control throughout the United States."[71]

Justice Kagan also filed a brief concurrence in the judgment.[72] She objected to the Court's use of presumptions of statutory interpretation to override what she viewed as clear statutory text.[73] Her opinion criticized the majority for "appoint[ing] . . . itself as the national decisionmaker on environmental policy."[74] She also warned that the Court's interpretation would "prevent[] the EPA from keeping our country's waters clean by regulating adjacent wetlands."[75] Nonetheless, she agreed that the Sacketts' wetlands did not qualify as "waters of the United States," and thus joined Justice Kavanaugh's concurrence in full.[76]

In *Sackett*, the Justices who concurred only in the judgment criticized the Court's opinion because of its perceived consequences for the environment. For example, Justice Kavanaugh's opinion worried about "significant repercussions for water quality and flood control throughout the United States."[77] Justice Kagan's opinion expressed concern that the majority opinion "prevents the EPA from keeping our country's waters clean by regulating adjacent wetlands"[78] because of the majority's alleged desire to "rescue property owners from Congress's too-ambitious program of pollution control."[79] These criticisms miss the mark, however. First, the Court's dispute was focused only on a narrow category of wetlands — those that are separated from covered waters by a barrier. Although it is uncertain how many such wetlands exist in the United States, there is reason to believe that the number is relatively small. Second, the Court's decision in *Hawaii Wildlife Fund* should protect even noncovered wetlands from certain types of pollution. Third, the Court's opinion itself emphasized the prerogative of state governments to promulgate as much wetlands regulation as they desire. Understanding these mitigating factors should reduce the stakes of this dispute.

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[69] *Id.* at 1366–67.
[70] *Id.* at 1365.
[71] *Id.* at 1362.
[72] *Id.* at 1359 (Kagan, J., concurring in the judgment). Justice Kagan was joined by Justices Sotomayor and Jackson.
[73] *Id.* at 1361.
[74] *Id.* at 1362.
[75] *Id.* at 1361.
[76] *Id.* at 1362 (Kavanaugh, J., concurring in the judgment).
[77] *Id.*; *see also id.* at 1368–69.
[78] *Id.* at 1361 (Kagan, J., concurring in the judgment).
[79] *Id.* at 1360.

First, it is unclear just how many additional wetlands would have come within the Clean Water Act's coverage if Justice Kavanaugh's opinion had commanded a majority. But the number is likely small. To see why, it is helpful to start with the maximal claims that environmental groups have made about the decision's reach. Environmental groups have exclaimed that "[m]ore than half of the 118 million acres of wetlands in the United States are threatened by this ruling."[80] The source for this claim appears to be an internal EPA email chain from 2017 that the Agency released to satisfy a Freedom of Information Act request.[81] The seventh and eighth slides of a presentation attached to that email claim that 50.9% of "potential wetland acreage" mapped by the "NWI" (presumably the National Wetland Institute)[82] does not have a "continuous surface connection" to any "stream feature" mapped by the "NHD" (presumably the National Hydrography Dataset).[83]

This 2017 slideshow cannot support claims that *Sackett* threatens 51% of the nation's wetlands. That is true even when comparing the majority to Justice Kennedy's "significant nexus" test from *Rapanos* (which was rejected by all nine Justices in *Sackett*), and especially when comparing the majority to Justice Kavanaugh's *Sackett* concurrence. As an initial matter, it is dubious to characterize as "wetlands" what the slideshow calls "potential wetland acreage."[84] But more fundamentally, claims that the *Sackett* Court threatened over half the nation's wetlands suffer from a denominator problem. The relevant baseline for comparison cannot be every wetland in the United States, since not even a maximal interpretation of the Clean Water Act would protect every wetland in the nation. In fact, the Supreme Court already foreclosed such a

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[80] *Supreme Court Catastrophically Undermines Clean Water Protections*, EARTHJUSTICE (May 25, 2023), https://earthjustice.org/brief/2023/supreme-court-sackett-clean-water-act [https://perma.cc/4MAA-ASJC]; *see also* John Rumpler, *What Does the Supreme Court's Decision in* Sackett *Mean for Missouri Rivers?*, ENV'T AM. RSCH. & POL'Y CTR. (June 7, 2023), https://environmentamerica.org/center/updates/what-does-the-supreme-courts-decision-in-sackett-mean-for-missouri-rivers [https://perma.cc/9PHD-QRQ2] ("[The Court's] extreme interpretation of the law leaves at least half of our nation's remaining wetlands without federal protection."); Brief of Amici Curiae Water Resource Management Organizations in Support of Respondents at 6, *Sackett*, 143 S. Ct. 1322 (No. 21-454), 2022 WL 2238828 ("Requiring a continuous surface water connection would . . . exclude 51% (if not more) of the Nation's wetlands.").

[81] *See* Ariel Wittenberg & Kevin Bogardus, *EPA Falsely Claims "No Data" on Waters in WOTUS Rule*, E&E NEWS (Dec. 11, 2018, 1:17 PM), https://www.eenews.net/articles/epa-falsely-claims-no-data-on-waters-in-wotus-rule [https://perma.cc/95LA-VVLS] (citing Email from Stacey M. Jensen, Reg. Program Manager, U.S. Army Corps Eng'rs, to John Goodin, Acting Dir., Off. Wetlands, Oceans & Watersheds, EPA (Sept. 5, 2017, 1:00 PM), https://www.biologicaldiversity.org/programs/environmental_health/pdfs/Leaked-EPA-analysis-of-WOTUS-replacement.pdf [https://perma.cc/S9RL-G3EJ] [hereinafter EPA FOIA Response]); Brief of Amici Curiae Water Resource Management Organizations in Support of Respondents, *supra* note 80, at 6 (citing EPA FOIA Response for the proposition that requiring a continuous surface connection would exclude 51% of the nation's wetlands from coverage).

[82] EPA FOIA Response, *supra* note 81, at 8.

[83] *Id.* at 9.

[84] *Id.*

maximal reading decades earlier, when it held in *Solid Waste Agency v. U.S. Army Corps of Engineers*[85] (*SWANCC*) that the Clean Water Act did not extend to "nonnavigable, isolated, intrastate waters."[86] As a 2014 Fish and Wildlife Service report explains, "[f]ollowing a Supreme Court decision in 2001 [*SWANCC*] . . . , [scholars] concluded that the majority of wetlands in the [Prairie Pothole Region] were no longer considered waters of the United States and thus not afforded federal protection" under the Clean Water Act.[87] And some of the same environmental groups that have trumpeted the 51% figure have also emphasized just how many wetlands are isolated from covered waters. For example, one amicus brief claimed that "88% of the wetlands in a major region of the Upper Midwest are geographically isolated."[88] Crucially, to the extent that those 88% of wetlands in a "major region of the Upper Midwest" are indeed separated from covered waters by more than just a barrier,[89] then those wetlands would flunk Justice Kavanaugh's test as well as the majority's test. In sum, it is unlikely that many more wetlands would have remained within the Clean Water Act's scope if Justice Kavanaugh's concurrence had won the day.

Second, the Supreme Court's recent decision in *Hawaii Wildlife Fund* means that many of the wetlands described in Justice Kavanaugh's concurrence will still be protected by the Clean Water Act, if they are hydrologically significant enough to affect the quality of otherwise covered waters. *Hawaii Wildlife Fund* exemplifies how discharging pollutants into areas that are not covered by the Clean Water Act can still result in a violation of the Act. In that case, the County of Maui, Hawaii, pumped treated wastewater into underground wells, which were undisputedly not "waters of the United States."[90] The problem was that the wastewater traveled about half a mile from the wells into the Pacific Ocean, which *is* a body of water covered by the Clean Water Act.[91] The Court held that this scheme violated the Clean Water Act, because the Act forbids "the functional equivalent of a direct discharge from the point source into navigable waters."[92] The Court explained that when determining what counts as the functional equivalent

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[85] 531 U.S. 159 (2001).

[86] *Id.* at 171; *see also id.* at 168 (holding that the Corps could not claim jurisdiction over "ponds that are *not* adjacent to open water").

[87] T.E. DAHL, U.S. FISH & WILDLIFE SERV., STATUS AND TRENDS OF PRAIRIE WETLANDS IN THE UNITED STATES 1997 TO 2009, at 48 (2014), https://www.fws.gov/wetlands/documents/Status-and-Trends-of-Prairie-Wetlands-in-the-United-States-1997-to-2009.pdf [https://perma.cc/Z7JK-JCZ2].

[88] Brief of Amici Curiae Water Resource Management Organizations in Support of Respondents, *supra* note 80, at 7 (citing DAHL, *supra* note 87, at 20).

[89] *See* DAHL, *supra* note 87, at 20 n.13 (clarifying that the 88% figure includes wetlands separated by over one hundred feet from various water features or wetland complexes).

[90] *See* County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1469 (2020).

[91] *Id.*

[92] *Id.* at 1468.

of a direct discharge, courts should consider multiple factors, of which "[t]ime and distance" are typically the most important.[93] In a concurring opinion, Justice Kavanaugh argued that the decision was fully consistent with Justice Scalia's *Rapanos* plurality opinion, which had explained that "the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates" the statute.[94]

Hawaii Wildlife Fund should straightforwardly apply to protect many of the wetlands that were the subject of Justice Kavanaugh's concern in *Sackett*. Although these wetlands no longer come within the Clean Water Act on their own terms, they will still enjoy protection from pollution that flows through them and into covered waters. For example, Justice Kavanaugh's *Sackett* concurrence worried that "[b]ecause of the movement of water between adjacent wetlands and other waters, pollutants in wetlands often end up in" otherwise covered waters, and that barriers "do not block all water flow and are in fact evidence of a regular connection between a water and a wetland."[95] That is exactly right — and precisely because of that hydrological connection, if an emitter dumps pollution into otherwise-unprotected wetlands that then travels a short time and distance into covered waters, such dumping would count as the "functional equivalent of a direct discharge."[96] It would require only a simple application of *Hawaii Wildlife Fund* to reach that result.[97]

Third, states retain plenary authority to regulate discharges into wetlands. "The baseline under the Constitution, the [Clean Water Act], and the Court's precedents is state control of waters."[98] For that reason, "[i]t is simply wrong" to assume that "invalidating or curtailing . . . federal regulations will allow landowners to do as they like, free from all constraints."[99] Many states already regulate wetlands extensively within their borders,[100] and the Court's opinion itself emphasizes their ability

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[93] *Id.* at 1477; *see also id.* at 1476.

[94] *Id.* at 1478 (Kavanaugh, J., concurring) (quoting Rapanos v. United States, 547 U.S. 715, 743 (2006) (plurality opinion)).

[95] *Sackett*, 143 S. Ct. at 1368 (Kavanaugh, J., concurring in the judgment).

[96] *Haw. Wildlife Fund*, 140 S. Ct. at 1468.

[97] To be sure, this *Hawaii Wildlife Fund* theory likely would not capture the degradation that occurs when "fill material," such as rocks, concrete, and other solids, is dumped into a wetland, assuming that such material stays in the wetland and does not travel to covered waters. But this assumption has been debated, including in *Rapanos*. *Compare Rapanos*, 547 U.S. at 744 (Scalia, J.) (plurality opinion) (arguing that dredged or fill material, "which is typically deposited for the sole purpose of staying put, does not normally wash downstream"), *with id.* at 774–75 (Kennedy, J., concurring in the judgment) (arguing that Justice Scalia's proposition was questionable because it "seems plausible that new or loose fill . . . could travel downstream," *id.* at 774), *and id.* at 807 (Stevens, J., dissenting) (arguing that at least some fill material would make its way downstream).

[98] *Sackett*, 143 S. Ct. at 1357 (Thomas, J., concurring).

[99] Brief of the Farm Bureaus of Arkansas et al. as Amici Curiae Supporting Petitioners at 17, *Sackett*, 143 S. Ct. 1322 (No. 21-454), 2022 WL 1260637 [hereinafter Farm Bureaus Brief].

[100] *See, e.g.*, *id.* at 17–27.

to continue doing so.[101] And state wetland regulations could deliver more lasting protection than federal regulations. The story of federal regulation of "waters of the United States" has been one of back-and-forth "whiplash."[102] In just the past ten years, the EPA and Army Corps have made three major changes to their regulation defining "the waters of the United States."[103] But state regulations would not necessarily be subject to the whims of shifting presidential politics.

Nor is wetlands regulation a narrowly partisan issue that only some states have pursued. Wetlands protection is an issue that has often transcended perceived ideological boundaries. For example, after the Supreme Court's decision in *SWANCC*, a group of Republican sportsmen went to the White House and "persuaded President [George W.] Bush not to weaken wetlands protections."[104] And multiple "red" states have promulgated wetlands regulations more extensive than those required by any federal mandate.[105] In short, states remain free to protect wetlands as much as they desire.

Predicting the real-world environmental consequences of judicial opinions is always a fraught endeavor. Nonetheless, the reaction to *Sackett* has almost uniformly condemned the perceived ecological consequences of the Court's opinion. Although *Sackett* curtailed the scope of the Clean Water Act, the narrow disagreement between the two camps of Justices, combined with the ability of *Hawaii Wildlife Fund* and state regulation to address the wetlands not covered by the Clean Water Act, mean that the criticisms leveled by two of the case's concurring opinions are overstated. The Court should be praised, not condemned, for refusing to speculate about the implications of its decision for the environment, and instead leaving it up to Congress and the states to respond as they see fit.

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[101] *Sackett*, 143 S. Ct. at 1344.

[102] Emily Newburger, *"Why Is It So Hard to Make Environmental Law?*," HARV. L. TODAY (Apr. 18, 2023), https://hls.harvard.edu/today/why-is-it-so-hard-to-make-environmental-law [https://perma.cc/659U-MNF7] (quoting Professor Richard Lazarus as describing "'presidential administration whiplash' on environmental law from president to president").

[103] Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3005 (Jan. 18, 2023) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pt. 120) ("Since 2015, the agencies have finalized three rules revising the definition of 'waters of the United States.'").

[104] ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 600 (9th ed. 2022); *see also id.* at 599.

[105] *See, e.g.*, Farm Bureaus Brief, *supra* note 99, at 20 (explaining that Iowa subjects "any . . . body or accumulation of water" within its borders to state regulation (quoting IOWA CODE § 455B.171(41) (2003))); *id.* at 22 (noting that Iowa is "currently constructing 40 new conservation wetlands"); *id.* at 24 (explaining that Kansas regulates all wetlands within its borders).